



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

ANTHONY A. WHITEHURST,
Plaintiff,

V.

SHOWTIME NETWORKS, INC.,
Defendant.

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CASE NO. 1:05-CV-407

**MEMORANDUM ORDER ADOPTING
REPORT AND RECOMMENDATION ON MOTION FOR RELIEF**

Pursuant to 28 U.S.C. § 636(b)(1)(A) and the Local Rules for the United States District Court, Eastern District of Texas, Appendix B, the Court referred this matter to a United States Magistrate for consideration of pretrial matters and proceedings. On April 19, 2006, Judge Giblin issued his *Report and Recommendation* [Clerk's doc. #17] on Plaintiff, Anthony Whitehurst's *Motion for Relief* [Clerk's doc. #14]. Judge Giblin recommended that the Court deny Mr. Whitehurst's request for relief from its order dismissing the case.

Mr. Whitehurst filed objections to the magistrate's report [Clerk's doc. #20]. He argues that Judge Giblin's findings are prejudicial to him because if the Court denies him relief from the order of dismissal, thus requiring him to file a new lawsuit if he chooses

to proceed, the Court “could be creating a statute of limitations defense for the defendant and/or putting into question the constitutionality of 28 U.S.C. § 1915(g) by intentionally requiring the plaintiff to re-file his suit outside the statute of limitation period.” *See Objections.*

The Court overrules Mr. Whitehurst’s objections. Judge Giblin was correct in recommending denial of the motion for relief. At the time Mr. Whitehurst filed this civil action, it was frivolous as a “third strike” lawsuit under 18 U.S.C. § 1915(g) and was, therefore, properly dismissed. Mr. Whitehurst’s present arguments do not change that fact. Additionally, Mr. Whitehurst offers no authority in support of his claim that if he were to re-file his claims, they would be precluded by a statute of limitations defense. In fact, his claims may have been tolled by filing this lawsuit. Most importantly, that issue is not before the Court at this time because this case has already been dismissed in its entirety. Mr. Whitehurst’s concerns about the Court “creating a statute of limitation defense” in no way warrant the Court overturning its final order of dismissal, and Mr. Whitehurst does not offer a valid legal argument suggesting otherwise. As Judge Giblin fully discussed in his report, a motion for relief asserted under Federal Rule of Civil Procedure 60(b)(5) is not even the proper procedural vehicle for attacking the order of dismissal at issue here.

Accordingly, after conducting a *de novo* review of the plaintiff’s objections, the motion, and all evidence presented, the Court agrees with the magistrate’s *Report and Recommendation*. *See* 28 U.S.C. § 636(b)(1). The Court, therefore, **ADOPTS** the *Report and Recommendation* [Clerk’s doc. #17] and incorporates the magistrate’s findings and conclusions of law in support of this memorandum order. The Court

ORDERS that the *Plaintiff's Motion for Relief From Judgment or Order* [Clerk's doc. #14] is **DENIED**. This proceeding remains closed.

So **ORDERED** and **SIGNED** this **23** day of **May, 2006**.

A handwritten signature in black ink, appearing to read "Ron Clark", written in a cursive style.

Ron Clark, United States District Judge